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MAY 3 1961
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No. 882

In the Supreme Court of the United States

OCTOBER TERM, 1960

JACK SHOWELL and DOROTHY SHOWELL, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The initial findings of fact and opinion of the Tax Court (R. 11-27, No. 14760) are reported at 23 T.C. 495. The first opinion of the Court of Appeals is reported at 238 F. 2d 148. The memorandum findings of fact and opinion of the Tax Court on the first remand (R. 22-27, No. 15710) are not officially reported. The second opinion of the Court of Appeals is reported at 254 F. 2d 461. The memorandum find-

ings of fact and opinion of the Tax Court on the second remand (R. 84-90) are not officially reported. The third opinion of the Court of Appeals (Pet. App. A) is reported at 286 F. 2d 245.[1]

JURISDICTION

The judgment of the Court of Appeals was entered on January 9, 1961. (Pet. App. B.) The petition for a writ of certiorari was filed on April 6, 1961. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

Whether the Court of Appeals was warranted in affirming the Tax Court's factual determination of the amount of the taxpayers' income from bookmaking in 1949, in view of the taxpayers' failure, although granted repeated opportunities to do so, to introduce credible evidence to sustain their burden of proof of alleged offsetting losses.

STATUTE INVOLVED

Internal Revenue Code of 1939:

> SEC. 23. DEDUCTIONS FROM GROSS INCOME.
>
> In computing net income there shall be allowed as deductions:
>
> * * * * *

[1] References to prior proceedings are to the transcripts of record in *Showell* v. *Commissioner*, C.A. 9th, Nos. 14760 and 15710.

(h) *Wagering Losses.*—Losses from wagering transactions shall be allowed only to the extent of the gains from such transactions.

* * * * *

(26 U.S.C. 1952 ed., Sec. 23.)

STATEMENT

The taxpayers are husband and wife who filed their separate income tax returns for 1949, prepared on the community basis. In these returns the taxpayers reported income from interest, from a partnership, and rental income from a building. No income was reported from, or loss deducted with respect to, any wagering operations. (R. 85.)

During 1949 the taxpayer Jack Showell received money from booking bets on baseball, football and basketball games. No receipts or tickets were given for money placed on bets. Showell did not keep regular, adequate and permanent books and records of his wagering transactions. (R. 85.)

Upon the basis of data supplied by Showell to a revenue agent, the Commissioner determined that the taxpayers realized income of $22,563.66 from wagering operations in 1949 and computed deficiencies for each taxpayer on that basis. (R. 8-9, 17-18, No. 14760.) The Tax Court in deficiency proceedings held that the taxpayers' net gains from wagering should be reduced by $3,000 in addition to the wagering losses allowed by the Commissioner. (R. 18-21, No. 14760.) The Court of Appeals ultimately affirmed (Pet. App. A, pp. 1-3) the Tax Court's finding (R. 23, No. 15710; R. 85) that the taxpayers had un-

reported income from wagering operations in 1949 amounting to $19,563.66. Previously, the Court of Appeals had remanded the case, first on the ground that the Tax Court's initial findings were not sufficiently definitive (238 F. 2d 148, 153) and a second time for further evidence, particularly with respect to the authenticity of the taxpayers' allegedly contemporaneous record of income (254 F. 2d 461, 463).

ARGUMENT

The real issue in this case concerns the correctness of the Tax Court's factual determination (R. 85) that the taxpayers had unreported income from wagering operations in 1949 in the amount of $19,563.66. The evidence initially presented by the taxpayers to the effect that in 1949 they sustained gambling losses in excess of their unreported gains has been fully discredited, and despite ample opportunities the taxpayers have failed to produce any credible evidence in support of their claims. The question actually presented possesses no public importance and turns entirely upon the particular factual circumstances, which already have been reviewed three times by the Tax Court and by the Court of Appeals. There is no occasion for review by this Court.

1. Throughout these proceedings the taxpayers have contended, and apparently still assert (Pet. 32), that a single yellow sheet of accounting work paper (Exhibit 3 (R. 24-25, No. 15710)), the data on which was initially furnished by Jack Showell to the revenue agent (R. 17, No. 14760), is a contemporaneous daily bookkeeping record of their gains and losses from

wagering in 1949. The taxpayers' list of daily net gains from wagering in 1949, appearing on this sheet, was accepted by the Commissioner and has not been disputed in the proceedings.[2] However, the Commissioner required proof of the claimed daily net losses, and the taxpayers relied upon this Exhibit 3. Taxpayer Jack Showell specifically testified that the entries on Exhibit 3 were made contemporaneously every week or day. (R. 88-89.) Following its second review of the proceedings, in which the Tax Court had found Exhibit 3 unreliable, the Court of Appeals instructed (254 F. 2d 461, 463):

> We remand the case to be reopened by the Tax Court to receive further evidence. Particularly the authenticity of Exhibit 3 should be a subject of inquiry.

Upon remand, the taxpayers declined to present additional evidence. (Pet. App. A, p. 2.) The Commissioner then proved by an expert witness that Exhibit 3 was not a contemporaneous business record but that in fact the entries thereon had been written in only a few sittings. (Pet. App. A, p. 2.) Consequently, the evidence upon which the taxpayers relied to establish their alleged wagering losses was discredited, and there remained nothing of probative value in the record to support the taxpayers' petition for redetermination.

As the court below noted (Pet. App. A, p. 3),

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[2] The figures in the "gain" column of Exhibit 3 were presumably net results of the bookmaking activities and therefore took into account some losses. (See R. 25, No. 15710.)

the burden of proving the claimed losses was upon the taxpayers, and in the absence of such proof the alleged losses properly were disallowed.[3] Tax Court Rule 32, adopted pursuant to Section 7453, Internal Revenue Code of 1954; see *Burnet* v. *Houston*, 283 U.S. 223, 227-228; *Federika* v. *Commissioner*, decided June 28, 1955 (1955 P-H T.C. Memorandum Decisions, par. 55,172), affirmed, 237 F. 2d 916 (C.A. 6th), certiorari denied, 352 U.S. 1025, rehearing denied, 353 U.S. 931. And it does not help the taxpayer to say that discrediting the exhibit which he claimed was evidence of his losses also discredited the same instrument upon which the Commissioner relied to prove the taxpayer's income; for, in the absence of any probative evidence to the contrary, the Commissioner's determination must stand.

2. The taxpayers' argument that this case involves the interpretation of Section 41 of the Internal Revenue Code of 1939—authorizing the Commissioner to use a method of accounting clearly reflecting the taxpayer's income—is not correct. The Commissioner did not reject the taxpayers' method of accounting but merely required that they prove that they did actually incur the gambling losses claimed. The taxpayers refused or failed to present evidence of their alleged losses except for the document (Ex-

[3] Aside from the losses included in the net gain figures (see footnote 2, *supra*), the Tax Court allowed a deduction of $3,000 as an approximation of probable additional losses. (R. 26-27, No. 15710). See *Cohan* v. *Commissioner*, 39 F. 2d 540, 544 (C.A. 2d)).

hibit 3) which the Commissioner proved was wholly unreliable. Such failure to furnish evidence in support of claimed deductions from undisputed gains presents no question for review by this Court. The taxpayers have received all that they can reasonably demand on this record. See footnotes 2 and 3, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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MAY, 1961.

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